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RICHARD P. IEYOUB, in his official capacity as Attorney General of the State of Louisiana; M. J. "MIKE" FOSTER, JR., in his official capacity as Governor of the State of Louisiana; BOBBY P. JINDAL, in his official capacity as Secretary of the Louisiana Department of Health and Hospitals, and MADLYN B. BAGNERIS, in her official capacity as Secretary of the Louisiana Department of Social Services,

Petitioners,

versus

CAUSEWAY MEDICAL SUITE and HOPE MEDICAL GROUP FOR WOMEN, On behalf of themselves and the patients they serve,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

SUPPLEMENTAL AND REPLY BRIEF

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REPLY ARGUMENT

May It Please The Court:

I. Recent Internal Fifth Circuit Action In This Case and Seven-Judge Dissent from Denial of *En Banc* Reconsideration

On September 23, 1997, the U.S. Court of Appeals for the Fifth Circuit entered in its record of this case a *Per Curiam* reciting that an active member of the court (*sua sponte*) requested a poll of the active judges to determine whether a majority of such judges would vote to grant a rehearing *en banc* herein and that because a majority of the active judges failed to vote in favor of granting same, rehearing *en banc* was denied. Attached to this *Per Curiam*, however, was an impeccably reasoned, strongly persuasive opinion dissenting from the denial of the *en banc* rehearing. This dissenting opinion was authored by Circuit Judge Edith H. Jones and joined in by six other Circuit Judges.

Writ petitioners have already forwarded copies of these papers to this Honorable Court to serve in supplement to the writ petition's appendix. The dissenting opinion (*per* JONES, Cir. J.) provides virtually a complete answer and reply to plaintiff-respondents' (hereinafter simply "Causeway") brief in opposition. Hence, writ petitioners, by this reference, adopt this same dissenting opinion in and as the main portion of this reply brief as though written out herein *in extenso*.

II. Other Points In Reply

A. The opposition argument by Causeway and the thoughtful reasoning of the dissenting opinion authored by Circuit Judge Edith H. Jones (hereinafter simply, "Jones Opinion")[1] reveals the importance to this case of writ petitioners' Question No. 2, which is not moot. The Jones Opinion gives proper recognition to the fact that these statutory procedural provisions under attack by Causeway intend only to provide the means for assuring a *real* judicial decision – one applying the due process principles of reasoned judgment, evidentiary evaluation, and the providing of such protections as the particular circumstances of each case demands – by the juvenile court of the individual matter before it rather than an empty, hollow sham of an adjudication. Due process requires no less. In doing so, the Jones Opinion, unlike the majority decision and opinion of the Fifth Circuit in this case, which ignores the Louisiana Supreme Court precedent on this principle of statutory interpretation and construction of procedural statutes, gives proper deference to the *overriding* principle of statutory interpretation and construction for Louisiana *procedural* statutes – *viz.*, that such statutes are to be construed with due regard for the fact that rules of procedure are not ends in themselves but rather implement the substantive law for the purpose of achieving substantial justice for the parties. La. C.C.P.

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[1] The dissenting opinion by Circuit Judge Emilio Garza as a panel member on first consideration by the Fifth Circuit will, in contrast, hereinafter be referred to simply as the "Garza Opinion."

art. 5051.[2] *See also Bowman v. Weill Const. Co.*, 494 So.2d 314 (La. 1986); *Lambert v. Donald G. Lambert Const. Co.*, 370 So.2d 1254 (La. 1979); *State v. Standard Oil Co. of Louisiana*, 188 La. 978, 178 So. 601 (La. 1938). Proper recognition is also implied in the Jones Opinion for the role of Louisiana's juvenile courts, whose very existence and inherent powers have the "primary aim . . . to effectuate whatever action . . . would be in the 'best interest' of the child or children involved," *State v. Thomas*, 579 So.2d 1086, 1087 (La. App. 4th Cir. 1991), *writ den.*, 586 So.2d 535 (La. 1991).

Thus, the Jones Opinion properly recognizes that the parental notification provision is to provide the juvenile court with the information and evidence it needs to make a proper adjudication – *i.e.*, a reasoned and reasonable decision based on all the relevant facts of each particular case – as to whether abortion is really in the best interests of the minor. Accordingly, the actual making of a judicial decision as to whether it is in the minor's best interests to notify her parents includes a careful judicial weighing of several substantial factors, which include, but are not necessarily limited to, (1) whether or how much needed

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[2] Both the La. Children's Code (Ch.C.) and the La. Code of Civil Procedure (C.C.P.) are generally applicable to these juvenile court proceedings. *See*, the latest version of La. R.S. 40:1299.35.5(B)(13), Ch.C. art. 104(2), and *In the Interests of the Minor Child, J.M.*, 590 So.2d 565, 568-571 (La. 1991) (provisions of civil procedure in Louisiana's Revised Statutes of 1950 must be read *in pari materia* with the concurrently applicable Code of Civil Procedure (and Children's Code in this particular matter) so as to constitute a wholly integrated, consistent body of procedural law applicable to case).

is the input of the parent(s) to a proper determination of whether the abortion is in the best interest of their minor daughter, (2) whether the abortion is, under the evidence already adduced, clearly in the best interests of the immature minor without parental notification, (3) whether or to what extent a particular minor may be at risk for abuse from her parent(s) as a result of the notification or from an adult boyfriend or others as a result of a failure to make the notification, and (4) whether and/or to what extent her particular circumstantial facts, physical, psychological, and medical condition and history, personality development and disposition, beliefs, heirarchy of values, personal history, education, and other factors identified in *Doe v. Bolton*, 410 U.S. 179 (1973) [*Cf. H.L. v. Matheson*, 450 U.S. 398, 404-405 (1980)] as being necessary and pertinent to a proper abortion determination can be obtained from alternative sources more agreeable to the minor.

In this regard, then, writ-petitioners' Question No. 2 is not moot; only the language issue over the words *shall* and *may*, which the Fifth Circuit panel majority had difficulty interpreting and, indeed, misinterpreted under state law and jurisprudence, is moot. Causeway apparently does not understand Question No. 2 or its real depth down to the heart and essence of due process, upon which all of the *Bellotti v. Baird*, 443 U.S. 622 (1979) (*Bellotti II*) and post-*Bellotti II* jurisprudence is purportedly based. Thus, the juvenile court must consider each case as a whole and apply the due process principles of reasoned judgment, evidentiary evaluation, and the providing of such protections as the particular circumstances of each case demands (all "to effectuate whatever action- . . . would be in the 'best interest' of the child or children

involved," *State v. Thomas, supra*). Question No. 2 is the real, underlying issue in all of this jurisprudence dealing with judicial by-passes, because, in applying "the rule of reason" within these court procedures, it clarifies that all of Causeway's bizarre hypothetical results cannot be reasonably anticipated actually to occur and are not cognizable in considering the constitutional validity of Louisiana's procedural statute herein.[3]

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[3] Causeway notices in its opposition brief at p. 20 n.13 that writ petitioners herein did not seek review of the application in this case by the Fifth Circuit panel majority of the standard for judicial review of the facial validity of statutes announced in *U.S. v. Salerno*, 481 U.S. 739 (1987). *See Causeway Medical Suite, et al. v. Ieyoub, etc., et al.*, 109 F.3d 1096, 1104 (1997) ("like the district court, we apply the more rigorous *Salerno* standard to [the legislative enactment in this case]"). The standards of review governing the outcome of a case are always issues considered in a Fifth Circuit appeal. *Cf.* Fifth Circuit Local Rule 28.2.6. Writ petitioners did not seek review of this particular action of the appellate court below in this case because writ petitioners, not Causeway, prevailed on this issue; it would have been Causeway's burden to seek review of this issue by filing a cross-petition for *certiorari* if Causeway desires to have this ruling of the appellate court below changed. Otherwise, it should stand as the law applicable to this case.

Moreover, it is submitted that the standard of review urged in the appellate court below by Causeway, in effect, encourages the federal courts to exceed and violate their U.S. Const. art. III limitations, as well as the separation of powers structured in the U.S. Constitution. From the earliest times, the court's authority to declare a statute unconstitutional can arise only within a "case or controversy" for the purpose of deciding such case or controversy in accordance with a constitutional provision rather than a conflicting statutory provision. *Marbury v. Madison*, 1 Cranch 137, 177-178, 2 L.Ed. 60, 73-74 (1803); *U.S. v. Raines*, 362

B. Causeway's opposition brief argument that the statute requires that *both* parents must be notified in every case where notification is in the minor's best interest is unfounded. In this statute, the plural also denotes the singular, and *vice-versa*. *See* La. R.S. 1:7, La. Ch. C. art. 106, and La. C.C.P. art. 5055. Cases such as *Opdenwyer v. Brown*, 155 La. 617, 99 So. 482 (1924) (reconciling Civil Code articles on fixing boundaries of immovable property with articles on acquisitive prescription of immovable property and recognizing that unlike a string of statutes that might be referred to as a "code" in the

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U.S. 17, 20-21 (1960). In the case of *Members of the City Council of the City of Los Angeles, et al. v. Taxpayers for Vincent, et al.*, 466 U.S. 789, 796-798 (1984) (*per* STEVENS, J.), this court explained that facial invalidity was justified when the constitutional infirmity necessarily occurred within every case or controversy to which it would apply – that is, in all of the statute's applications – such that "a holding of facial invalidity expresses the conclusion that the statute could never be applied in a valid manner," *id*. It is further submitted that the standard for facial invalidity was improperly argued and correctly rejected (for the wrong reason) in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), for there the argument was that a statutory spousal notification provision operated constitutionally in those circumstances where the pregnant wife did not object to the notification but voluntarily concurred in telling her husband. Such a circumstance of voluntary compliance does not present true "case or controversy" jurisdiction in which the *Salerno* standard of federal court adjudication must operate. Likewise, the legislative branch is entitled to its power of enacting legislation by which the outcome of all those cases or controversies to which such legislation applies in a valid manner are governed and decided. Facially striking down a statute which operates validly in its application to a case of controversy, therefore, embroils the judiciary in depriving the legislative branch of a valid exercise of its constitutional power.

Common Law, a Civil Code is a comprehensively integrated body of law that is necessarily worded "with extreme care," 155 La. at 624, 99 So. at 484) and *State v. Muller*, 365 So.2d 464 (1978) (construing amended language in a substantive criminal statute defining and criminalizing obscenity in a certain manner in order to provide for its *stricti juris* application as required by Louisiana law and jurisprudence) – cases cited by Causeway in brief at pp. 9-10 n.4 – have no application under Louisiana law and jurisprudence to the kind of civil procedure statute residing in the Louisiana Revised Statutes of 1950 that is under attack in this case. Indeed, in terms of the reasoned determination that the juvenile court must make, it is possible under the language of this statute that both parents, one parent, or no parents at all, may be notified.

C. Also unfounded is Causeway's argument that once, in one of these proceedings, the juvenile court judge makes a determination that it is in the immature minor's best interest to notify her parents, the minor cannot avoid it, even if a higher court on appeal later might reverse any finding upon which such notification is predicated or even if the minor might, in light of that determination, prefer to choose other options such as not seeking the judicial-bypass authorization for the abortion in lieu of parental consent or deciding to carry the pregnancy to term without parental involvement or traveling to another state with different laws on minors and abortion or notifying and involving her parents on her own at a later time. *See* Causeway's brief at pp. 9-10 (and n. 5 on p. 10) and pp. 13-14. Under general procedural provisions and practice which must be read *in pari materia* with this

Louisiana procedural statute and are, therefore, applicable to these proceedings [*see* footnote 2, *supra*], not only has the minor applicant the power to withdraw (voluntarily dismiss) her court action and petition (application) at virtually any time *pendente lite*, thereby ending the proceedings and her quest for the judicial abortion authorization, but she also has an immediate right to appeal – which would be done according to the method specified in the latest version of La. R.S. 40:1299.35.5(B)(8) through (12) – "an interlocutory judgment which may cause irreparable injury," La. C.C.P. art. 2083(A), such as a decision to notify parents, or otherwise to invoke supervisory review of such an order. *See Herlitz Construction Company, Inc. v. Hotel Investors of New Iberia, Inc., et al.*, 396 So.2d 878 (1981) and footnote 1 therein.

D. Much of the overall thrust of Causeway's main argument in opposition brief is merely a recycling of the *Glick v. McKay*, 937 F.2d 434 (1991) and *Wicklund v. Salvagni*, 93 F.3d 567, 571-572 (1996) reasoning, which was summarily rejected in a *Per Curiam* opinion by this U.S. Sup. Ct. in *Lambert v. Wicklund*, ___ U.S. ___, 117 S.Ct. 1169, 137 L.Ed.2d 464 (March 31, 1997). Causeway objects that under Louisiana's statute an immature minor is subjected to the risk that her parents might be notified if such notification is found to be in her best interests, even if the abortion is also later found to be in her best interests – that is, even if *the abortion* is ultimately found to be in her best interests, the court will nevertheless have notified her parent(s) if it had first found that such *parental notification* was in her best interests. The contention is

that such parental notification violates *Bellotti II*'s anonymity requirement for parental-consent bypass procedures. But the parent or guardian of *every minor seeking an abortion* in Montana under *Lambert, including immature minors for whom abortion is in their best interests,* is to be notified of the abortion unless the minor shows to the court that she is mature and knowledgeable enough to make the abortion decision on her own, that she would be subject to parental abuse, or that such *parental notification* is not in her best interests (substantively, the same test as herein, since her best interests preclude exposure to abuse). Consequently, the same result that obtained in *Lambert v. Wicklund, supra,* should obtain in this case on this writ petition.

E. Causeway is in error in its contention that Question No. 4 was not an issue considered by the Fifth Circuit in arriving at its decision in this case. Certainly, one panel member considered it to be at the heart of the whole case. *See,* of course, the Garza Opinion. Question No. 4 is clearly an implicit, if not explicit, issue in every case involving minors and abortion, for such jurisprudence provides the foundational authority that is the *sine qua non* for the Fifth Circuit's decision in this case. Without that foundational authority, the outcome of the Fifth Circuit's decision herein would necessarily have been directly the opposite of what it was. Clearly, then, Question No. 4 was and is at the essence of the adjudication controlling the outcome and result of the ultimate decision obtained by the Fifth Circuit majority in this case.

CONCLUSION

Considering the foregoing, the writ petition, the Jones Opinion, and the Garza Opinion, this Honorable Court should grant the writ petition in this case and summarily reverse in a *Per Curiam* as was done in *Lambert v. Wicklund, supra*, or, alternatively, place this case on the calendar for briefing and argument on the merits.

Respectfully submitted,

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